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INSURANCE CONSUMER COUNSEL'S COLUMN

CLAIMS AND COVERAGE IN MONTANA FOR DAMAGE TO A VICTIM'S FAMILY MEMBERS

BY PROFESSOR GREG MUNRO¹

Introduction

The law, like psychology, has slowly developed to recognize that families are coordinated, interconnected and interdependent organisms in which each member plays an important role. Trial lawyers have long observed the devastating effects that injury or death of one member has on other members and the family as a whole. In cases of catastrophic injury or death of one member, devastation to the others and rents in the fabric of the family are inevitable. Historically, however, damage to family members caused by severe injury, or death of one was not cognizable in tort except where direct economic causation was provable.

Moreover, casualty insurance policies were drafted with "Each Person" and "Each Accident" and "Limits of Liability" clauses based on the assumption that benefit limits were defined by whether one or more persons suffered direct physical trauma and injury in an accident. Neither tort law nor insurance law made room for the possibility that a wife would suffer emotional injury from watching her husband's violent death when a semi collided with his farm equipment;² or a mother would suffer when watching her child severely injured in a crosswalk;³ or a father would suffer caring for the bowel and urinary functions of his incapacitated child run over while roller skating.⁴

Since the 1980s, however, the Montana Supreme Court has significantly expanded the situations for which tort law will compensate family members of those suffering severe injury or death. However, expanding tort law does nothing to secure adequate recovery for the family unless the newly recognized claims are also

covered by casualty insurance. Consequently, expanding the tort law has provoked a line of appellate cases examining issues of whether family member injuries and damages are covered by the auto casualty policies and whether they trigger "Each Accident" limits of coverage as opposed to "Each Person" limits of coverage, which is typically much less than the "Each Accident" coverage limits.

This article explores those situations in which Montana tort law now recognizes secondary injuries to family members resulting from primary severe injuries or death of another family member, which recognition may invoke additional auto insurance coverage. The author will first make a short survey of the development of Montana tort law insofar as it has come to take cognizance of family injuries and will then look at the application of insurance law to those claims with special emphasis on recent cases. Time flies, and the author notes that it has been seven years since "Insurance coverage for Damages for Emotional Distress in Montana" appeared in this publication in Summer 2004.⁵ That article provides a more in-depth treatment of emotional distress cases. A summary of that article's history of tort development is a good place to begin our analysis.

We will use the term "family injury" to describe that class of injury and damage a family member suffers when another family member is severely injured or killed. We cannot call the family member class "derivative" or "parasitic" claims, because either term suggests that family member claims are automatically not so distinct and independent as to trigger a separate insurance limit, which is actually our inquiry. In

fact, many of the claims have been deemed derivative so as not to trigger a second limit, but others have attained the status of an independent "bodily injury" to a family member such that the "Each Accident" insurance liability limit is triggered, invariably doubling the limit of recovery. Some of the cases that will be discussed do not involve family member claims but develop emotional distress claims that could be pressed by family members. We will approach these claims and damages as they apply to family members, because it is through family members that the plaintiff's lawyer secures adequate compensation for the damages the family suffers. The same claims in non-family members might end up competing for limited insurance limits. We will use "Each Person/Each Accident" and "Per Person/Per Accident" to be interchangeable.

I. DEVELOPMENT OF FAMILY MEMBER CLAIMS IN MONTANA TORT LAW

A. Recognizing family members' sorrow, mental distress, and grief in wrongful death cases

It was not until 1983 that, in *Dawson v. Hill & Hill Truck Lines*,⁶ Montana abandoned the "English Rule" that one could not recover for emotional pain, even for the death of family members, because such a damage had no pecuniary value. Montana permitted recovery for loss of society and companionship only insofar as one could demonstrate a pecuniary value. *Mize v. Rocky Mountain Bell Telephone* (1909);⁷ and *Hollingsworth v. Davis-Daly Estates Copper* (1909).⁸ In *Dawson v. Hill & Hill Truck Lines*, the Montana Supreme Court held that

damages for the sorrow, mental distress, or grief of the parents of a deceased minor are recoverable under the wrongful death statute, MCA 27-1-512 (1979), overruling *Mize* and *Hollingsworth*.

A brief review of the wrongful death/survival action remedies available when a family member is killed is necessary here. By statute, Montana recognizes two civil actions that can arise from the death of an individual. MCA § 27-1-501, establishes what is called by convention the "survival" action, the civil action that existed in favor of the decedent before his or her death. By virtue of the statute, the action survives the death as an asset of the estate and can be pressed by the decedent's personal representative. This survival action covers claims that came into existence while the decedent was still alive. *Hern v. Safeco Ins. Co. of Illinois*, (2005).⁹ If a decedent survived personal injuries for "an appreciable length of time" before dying from those injuries, the court recognizes a survival action as it did in *Stephens v. Brown* (1972)¹⁰ where the decedent was struck by a motorboat, knocked into the water, and drowned. The court there held the time it took from the impact until death by drowning was an "appreciable length of time." The corollary is that there is no survival action if the person died instantaneously. *Starkenburg v. State* (1997).¹¹

While the survival action belongs to the estate of the deceased person, MCA § 27-1-513 recognizes a separate action for wrongful death, which the court in *Fisher v. Missoula White Pine Sash Co.* (1974),¹² said creates an independent right in designated survivors for the damages they sustained as a result of the decedent's death. Hence, the wrongful death action belongs to the heirs. However, MCA § 27-1-501(2) provides that survival and wrongful death actions "must be combined in one legal action and any element of damages may be recov-

ered only once."¹³ Part of our inquiry then is which family member damages can be addressed in which of these two causes of action.

B. Recognizing family members' emotional distress at other's severe injury or death

At the same time it decided *Dawson*, the Montana Supreme Court issued *Versland v. Caron Transport* (1983)¹⁴ which followed the landmark 1968 California case of *Dillon v. Legg*,¹⁵ allowing a bystander recovery for negligent infliction of emotional distress regardless of whether the bystander suffered any physical impact or was even in the "zone of danger." The Montana court in *Versland* required that it be reasonably foreseeable that the defendant's conduct that caused injury or death to a family member would also cause mental distress to another family member who witnessed the accident. A family member bystander claim has three required elements of proof: (1) the emotional impact came from a sensory and contemporaneous perception of the accident; (2) there must be a close relationship between the plaintiff and victim; and (3) the victim must be killed or sustain serious physical injury as a result of defendant's negligence. In *Maguire v. State* (1992), the court made it plain that a family member who was not at the scene could not recover under the *Versland* standard.¹⁶ We should also note that *Versland* did not require physical manifestation of the emotional trauma.

C. Recognizing emotional distress for substantial invasion of protected interest absent physical or mental injury

A line of cases that did not involve family member claims could, nevertheless, apply to family members. In *Johnson v. Supersave* (1984),¹⁷ and *Niles v. Big Sky Eyewear* (1989),¹⁸

both cases of false imprisonment in jail, the court allowed compensation in situations that did not involve physical or mental injury. The court in *Johnson* determined that there is a difference between injury and distress and held that emotional distress could be compensated if the tortious conduct resulted in a substantial invasion of a legally protected interest and caused a significant impact upon the person of the plaintiff.

In *First Bank, (N.A.)-Billings v. Clark* (1989),¹⁹ the court adopted comment (b) of the Restatement (Second) of Torts § 46 (1965) which requires that, "The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it." The court found Clark's testimony in his bank bad faith case that he "felt bad, lost sleep and became withdrawn" as inadequate to support such a claim. Pertinent to family member damages, is the fact that the court found the necessary legally protected interest to be "the interest in freedom from emotional distress."

This raises the question, could a family member have a *Johnson v. Supersave* claim without physical or mental injury? Consider this actual fact scenario: Missoula police and sheriff's deputies responding to a nighttime complaint of attempted purse snatching at a mall mistakenly stopped a new vehicle driven by a federal probation officer and occupied by his wife as well as adolescent daughter and son. The deputies, with guns drawn and aimed at the heads of the probation officer and his son, forced them to lie face down in the gravel, their hands handcuffed behind them, and guns still trained at their heads. The probation officer's entreaties to take the loaded guns away from their heads and not to handcuff the son behind his back because of a recent shoulder surgery were met with obscenity laced orders to "Shut the ____ up!" The hysterical wife

and daughter were removed from the vehicle and placed in the back seat of a patrol car. Question: Under *Johnson*, would the wife and daughter have emotional distress claims for observing the treatment of the husband and son even though they could not prove physical or mental injury?

D. Expanding loss of consortium claims

A husband's right to loss of consortium damages was recognized at British common law. Federal courts were first to acknowledge a Montana wife's right to consortium damages in *Duffy v. Lipsman* (1961),²⁰ *Dutton v. Hightower* (1963),²¹ and *Hall v. United States* (1967).²² The Montana Supreme Court followed suit in *Bain v. Gleason*, (1986).²³ The court in *Pence v. Fox*, (1991)²⁴ confirmed that "Montana allows loss of consortium claims, pursuant to Montana's Wrongful Death Statutes, by a parent whose child has been killed, and by a child whose parent has been killed."²⁵ In *Pence*, the court held that minor children have a separate cause of action for loss of consortium when a parent is rendered quadriplegic. The court concluded, "that under the Montana case law and statutes as developed, minor children are entitled to the support, aid, protection, affection, society, discipline, guidance and training of their parent." The court quoted with approval the Colorado Federal District Court's term "loss of society and companionship" as being equally appropriate to "loss of consortium" which historically connoted rights deriving from a sexual relationship in marriage. In *Keele v. St. Vincent Hospital & Health Care*, (1993),²⁶ the court expanded the minor child's right to loss of parental consortium beyond quadriplegia to include any claim in which:

- (1) a third party tortiously causes the parent to suffer a

serious, permanent and disabling mental or physical injury compensable under Montana law;

- (2) the parent's ultimate condition of mental or physical impairment must be so overwhelming and severe that it causes the parent-child relationship to be destroyed or nearly destroyed.

Finally, in *Bear Medicine v. United States* (2002),²⁷ the Montana Federal District Court, on certified question, allowed parents recovery for loss of consortium of an adult child. The court reasoned that the Montana Supreme Court's record of development of consortium claims would justify such a holding.

Under present tort law, damage suffered by a family member is recognized as the basis for an independent cause of action that is nevertheless "parasitic" to the claim of the person suffering the direct injury. Hence, *Bain v. Gleason* (1986)²⁸ established that a spouse's loss of consortium claim is a distinct and independent cause of action under tort law, which is nevertheless, derivative of the bodily injury claim of the person suffering the direct physical injury. *Bain* has been the precedent in Montana for classifying claims involving language such as consortium, grief, sorrow or loss of care, comfort or society as parasitic to the claim of the family member who suffered the direct physical injury and therefore "derivative" for insurance purposes. This has truly become the *Bain* of consumer counsel's existence.²⁹

Note that Montana law confuses the relationship between damages for wrongful death claims, i.e., sorrow, mental anguish, and grief, on the one hand, and consortium damages, such as loss of care, comfort, society, and companionship on the other. While the court has on occasion conflated these as it did in citing *Dawson v. Hill*

& *Hill Trucking* for recognizing parents' right to consortium damages for death of a minor child, it also treats the claims as separate and distinct from each other in other cases. For example, in *Hern* (2005), the court reversed the mother's \$300,000 consortium verdict for the death of her daughter and yet upheld the \$450,000 verdict for "grief, sorrow, and mental anguish." The Montana Federal District Court, looking at Montana law said in *Bear Medicine* (2002):

These [wrongful death] damages for sorrow, mental distress or grief are an element of damages separate from loss of consortium. *Id.* Loss of consortium damages compensate the plaintiff for the loss of care, comfort, society and companionship of the decedent. *Keele v. St. Vincent Hospital & Health Care*, 258 Mont.158, 161, 852 P.2d 574,576 (1993). Damages for grief and sorrow compensate the plaintiff for the mental anguish and anxiety which occurs as a result of the decedent's death. *Dawson*, 206 Mont. At 331, 671 P.2d at 593.

The difference between wrongful death damages for grief and sorrow as opposed to loss of consortium damages for loss of society, comfort, and companionship may still be open to argument. Nevertheless, we can see that the range of loss of consortium claims has been expanded greatly in Montana in the last thirty years. Given changes in our society, it is inevitable that the court will one day address consortium damages for members of same-sex unions.

E. Recognizing Negligent Infliction of Emotional Distress (NIED) claims

The court expressly recognized the independent tort of negligent infliction of emotional distress in

Sacco v. High Country Independent Press, Inc. (1995),³⁰ a malicious prosecution case. Prior to *Sacco*, emotional distress was only a parasitic damage arising from a host cause of action. In *Sacco*, the court held that, "a cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent act or omission." The court also recognized a separate action for intentional infliction of emotional distress "where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission." The court previously had allowed emotional distress damages only in cases of "outrageous conduct."³¹ The court, in recognizing the twin torts for negligent and intentional infliction of emotional distress effectively abandoned *Versland's* bystander requirement, *Johnson's* requirement of a substantial invasion of a legally protected interest and *Maquire's* requirement of "outrageous conduct."

Treichel v. State Farm Mut. Auto. Ins. Co. (1997)³² involved a cause of action for emotional distress to a family member sufficiently independent to trigger the "per accident" limit of auto insurance coverage. Treichel was riding bikes with her husband and saw a car inflict a severe head injury to him from which he died. The court rejected the argument that the claim was merely a derivative claim a la *Bain* on the ground that Treichel herself was actually at the accident scene. It appeared that the court had reinstituted the bystander

requirement for recovering for emotional distress.

However, in 2003, the court in *Wages v. First National Ins. Co. of America*,³³ recognized the emotional distress claim of a father who was not present when his son was grievously injured by being run over by a truck while roller-blading. Wages filed his own claim for negligent infliction of emotional distress. The defense took the position that he could not sustain an independent non-derivative claim for negligent infliction of emotional distress without having witnessed the accident so as to suffer some contemporaneous impact. The court held that a person need not be at the scene of the accident so as to be a foreseeable plaintiff to whom the defendant would owe a duty that would support a claim for negligent infliction of emotional distress.

The court said that, when it mentioned in *Treichel* that she had witnessed her husband getting killed, it intended to support the distinction between NIED claims and loss of consortium claims such as *Bain* and did not mean to suggest that the bystander requirement existed again.

To determine foreseeability in NIED cases, the court said one would consider, "closeness of the relationship between plaintiff and victim, the age of the victim, and the severity of the injury of the victim and any other factors bearing on the question." Whether the person was a bystander could be considered also, but, by itself, could not be used to conclude that the plaintiff was unforeseeable.

The court, in *Sacco* (1995), had previously held that an independent

cause of action for negligent or intentional infliction of emotional distress arises under circumstances where: (1) serious or severe emotional distress to the plaintiff was (2) the reasonably foreseeable consequence of (3) the defendant's negligent or intentional act or omission. *Treichel* (1997) did not reinstate the contemporaneous impact requirement of *Versland* (1983). We should note that, in *Wages*, the court said that witnessing the accident was not necessary to foreseeability. Consequently, the family member who suffers severe emotional distress as a result of another family member's negligent bodily injury may state an independent claim for NIED, which triggers a separate limit of insurance.

Again, in *Henricksen v. State* (2004)³⁴ the court confirmed that one is not required to be a bystander to recover damages for emotional distress suffered as a result of serious injury to a family member.

Henricksen brought her own claim for negligent infliction of emotional distress after her three-year-old suffered skull fractures falling head first through staircase balustrades in the Montana State University Library. Henricksen learned immediately after the accident that another child had fallen through the same staircase a couple weeks earlier, a fact that she argued caused her emotional distress. The court rejected any requirement for direct emotional impact upon the plaintiff from the sensory and contemporaneous perception of the accident, citing *Sacco* and *Wages* for the rule that one need not be a bystander.

The court also confirmed that Henricksen had to meet the height-

"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."

~ John Adams

ened standard of severe or serious distress required by *Sacco*. The trial court had ruled that the family member need only meet that standard if there was no physical or mental injury. Henricksen introduced expert testimony of PTSD. The Montana Supreme Court held that emotional distress must always be severe or serious regardless of physical or mental manifestation. The court cited Restatement (Second) of Torts, § 46, comment k for the proposition that “[n]ormally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which *in itself* affords evidence that the distress is genuine and severe.” The court said, “A jury instruction on emotional distress should state that the severe and serious standard applies and that this standard can be met by proof that emotional distress resulted in shock, illness, or other bodily harm.”

F. Limiting the “serious or severe” standard to independent claims

Sacco’s standard that the emotional distress must be serious or severe to be cognizable in court only applies to the independent tort claims of negligent or intentional infliction of emotional distress. The court in *Jacobsen v. Allstate Ins. Co.* (2009),³⁵ overturned a district court ruling that the plaintiff in an insurance bad faith case was not entitled to an instruction for emotional distress damages unless he made a threshold showing that they were serious or severe as required by the court in *First Bank (N.A.) v. Billings v. Clark* in 1989.

The court after conceding that it had created confusion as to which standard applied in its decisions in *Seltzer v. Morton* (2007)³⁶ and *Lorang v. fortis Ins. Co.* (2008)³⁷ held that the “serious or severe” standard of *Sacco* applies only to the stand-alone independent tort causes of action and not emotional distress damages parasitic to an underlying tort. For those

claims, the court adopted the standard set out in Montana Pattern Instructions (M/PI.2d 25.02, 15.01-03) which states that “[t]he law does not set a definite standard by which to calculate compensation for mental end emotional suffering and distress.” In that decision, the court also noted that emotional distress damages are available in the context of third-party UTPA claims contrary to the apparent assertions of Allstate.³⁸

G. Summary of Available Family Member Tort Claims

We summarize by saying that, among the tort claims recognized by the Montana Supreme Court for addressing secondary injury to family members are the following:

1. Family members may recover for damages for sorrow, mental distress or grief over the death of a family member under the wrongful death statute, MCA 27-1-512 (1979). *Dawson* (1983).
2. Family members may press a stand-alone tort claim for negligent infliction of emotional distress where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant’s negligent act or omission, i.e., any claim where the tortfeasor negligently causes serious or severe injury to the victim and resulting emotional injury to the family member was foreseeable. *Sacco* (1995).
3. Family members may press a stand-alone tort claim for intentional infliction of emotional distress where the tortfeasor acted with substantial certainty of risk of injury or death, serious or severe injury or death occurs, and resulting emotional injury to

the family member was foreseeable. *Sacco* (1995).

4. A family member may recover emotional distress damages suffered as a result of another member’s injury or death which damages are parasitic to an underlying tort claim arising out of that injury or death. *Jacobsen* (2009); and *Peschel* (2009).

5. A family member may recover emotional distress damages suffered absent any mental or physical injury if the tortious conduct resulted in a substantial invasion of a legally protected interest and causes a significant impact upon the person of the plaintiff, i.e., watching the police mistakenly take one’s spouse out of the house at night handcuffed and at gunpoint. *Johnson* (1984); and *Niles* (1989).

6. A husband or wife may press a claim for loss of spouse’s consortium.

7. A parent or minor child may press a claim for loss of comfort, society and companionship of the other. *Pence* (1991); and *Keele* (1993).

8. A parent may press a claim for loss of comfort, society and companionship of an adult child. *Bear Medicine* (2002); and *Hern* (2005).

II. INSURANCE COVERAGE OF FAMILY MEMBER TORT CLAIMS UNDER MONTANA LAW

A. The basic policy language

The Insurance Services Office, trade organization for the property/casualty insurance industry, drafts the standard policy language for auto policies commonly used in Montana. The basic insuring agreement for the Personal Auto Policy Liability PART

A-LIABILITY COVERAGE
INSURING AGREEMENT
provides in pertinent part:

We will pay damages for
"bodily injury" or "property
damage" for which any "in-
sured" becomes legally respon-
sible because of an auto
accident.³⁹ * * *

The policy defines "Bodily In-
jury" for all coverages as follows:⁴⁰

"Bodily Injury" means bodily
harm, sickness or disease,
including death that results.

The "Limit of Liability" clause
for the liability coverage provides:

The limit of liability shown in
the Declarations for each per-
son for Bodily Injury Liability
is our maximum limit of liabil-
ity for all damages, including
damages for care, loss of ser-
vices or death, arising out of
"bodily injury" sustained by
any one person in any one auto
accident. Subject to this limit
for each person, the limit of
liability shown in the Decla-
rations for each accident for
Bodily Injury Liability is our

maximum limit of liability for
all damages for "bodily injury"
resulting from any one auto
accident.

The PART B-MEDICAL PAY-
MENTS COVERAGE INSURING
AGREEMENT provides:⁴¹

- A. We will pay reasonable ex-
penses incurred for necessary
medical and funeral services
because of "bodily injury":
1. Caused by accident; and
 2. Sustained by an insured.

The PART C-UNINSURED
MOTORIST COVERAGE INSUR-
ING AGREEMENT provides:

- We will pay compensatory
damages which an "insured" is
legally entitled to recover from
the owner or operator of an
"uninsured motor vehicle"
because of "bodily injury":
1. Sustained by an "insured," and
 2. Caused by accident.

The "Limit of Liability" clause
is essentially identical to that for the
liability coverage.

- B. Emotional distress covered as
"bodily injury"

*Treichel v. State Farm Mut. Auto.
Ins. Co.* (1997)⁴² held that negligent
infliction of emotional distress to a
family member triggers an additional
limit, the "per accident" limit, of
auto insurance coverage. Treichel was
riding bikes with her husband and
saw a car inflict a severe head injury
to her husband from which he died.
The court distinguished Treichel's
claim from *Bain* because Treichel was
at the accident so that she had a claim
that was not parasitic or derivative.
As mentioned above, *Treichel* sounded
like resurrection of *Versland's* by-
stander requirement, until the court
in *Wages* in 2004 said one could re-
cover for NIED without ever having
been to the scene of the accident.
The plaintiffs' bar was heartened by
the decisions in *Treichel* and *Wages*.

- C. Emotional distress not covered
as "bodily injury"

However, coming shortly after
Wages, the decision of *Jacobsen v. Farm-
ers Union Mutual Insurance Company* in
2004⁴³ was a blunt reminder that tort
and insurance law do not necessarily
converge. *Jacobsen* held that emotional
distress was not covered as "bodily
injury" under the auto policy. *Jacobsen*
found an auto crashed in a wheat
field and treated the driver's head

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injuries only to learn, when the driver was removed from the car, that he had actually shot himself in the head in a suicide attempt from which he later died.

Jacobsen claimed damages for his emotional distress from his own auto insurer, Farmers Union Mutual, under its UM and Med Pay coverages. Farmers Union Mutual refused any benefits for Jacobsen's resulting emotional distress on the grounds that they did not constitute "bodily injury" within the meaning of the UM statute § 33-23-201 or the UM policy agreement. Farmers Union Mutual's UM basic insuring agreement contained standard language:

We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."

The policy's definition of "bodily injury," which is consistent with the statute's, was as follows:

"Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these.

The Montana Supreme Court held, "[T]he term 'bodily injury,' as defined in Farmers Union UM policy, is limited to physical injury to a person caused by an accident and does not include emotional and psychological injuries stemming therefrom." The court distinguished *Treichel* by asserting that State Farm's policy in

Treichel did not define bodily injury and that the policy clearly covered such claims as loss of consortium. Further, State Farm was willing to cover emotional injuries but only up to the "one person" limitation in the policy. The *Treichel* court had held that State Farm was simply estopped to deny coverage and found that Carolyn Treichel had suffered an "independent and direct" injury as was deemed compensable in *Sacco*.

For the court in *Jacobsen* (2004), the fact that a person has suffered an emotional "injury" for purposes of tort law does not mean the emotional injury is "bodily injury" under insurance contract law. The court quoted with approval Farmers Union's assertion that "[t]here is no dispute that Montana tort law allows for recovery of purely emotional damages. However, this case involves the interpretation of contract, and tort law is wholly irrelevant to that interpretation." *Jacobsen* (2004) seemed to close the door on insurance coverage for emotional distress.

D. Differentiating coverage based on policy language

Grim as *Jacobsen's* result was, it could be avoided in cases of slightly different policy language. In *Allstate Insurance Company v. Wagner-Ellsworth*,⁴⁴ a school child, Mathew Rusk, was severely injured when an Allstate insured ran over him while he and his brother Brandon were in a school crosswalk. The mother, Tiffany Rusk, arrived moments later to find her son lying injured and then accompanied him to the hospital in the ambulance. Allstate paid out the \$50,000 policy limits on the Bodily Injury coverage, but the mother and brother brought their own claims for negligent infliction of emotional distress alleging physical and mental injuries. Both underwent therapy. Allstate refused to defend or indemnify for those claims on the basis of the *Jacobsen* (2004)

decision and filed a declaratory action in which it was granted summary judgment that it owed neither defense nor indemnity. Rusks appealed.

The basic BI coverage agreement provided in pertinent part that, "Allstate will pay damages which an insured person is legally obligated to pay because of: a. bodily injury sustained by any person. . ." It defined "bodily injury" to mean "physical harm to the body, sickness, disease, or death, but does not include: a. Any venereal disease; b. Herpes; c. Acquired Immune Deficiency Syndrome (AIDS); d. AIDS Related Complex (ARC); e. Human Immunodeficiency Virus (HIV); or any resulting symptom, effect, condition, disease or illness related to a. through e. listed above." Also, the policy Limitation of Liability section provided that, "[t]he limit stated for each person for bodily injury is our total limit of liability for all damages because of bodily injury sustained by one person, *including all damages sustained by anyone else as a result of that bodily injury.*" (Court's emphasis added.)

The issue raised was whether the emotional distress claims of Tiffany and Brandon could be covered under the policy's BI coverage language. The court held that the policy would cover damages for emotional distress of Tiffany and Brandon because of bodily injury sustained by Mathew. The court reasoned that the policy's broad promise to pay "damages which an insured person is legally responsible to pay because of bodily injury sustained by any person. . ." means emotional damages of Tiffany and Brandon because of Mathew's bodily injury are covered. This is a broader promise to pay than was contained in the *Jacobsen* (2004) policy.

However, the court then ruled that the damages for emotional distress of Tiffany and Brandon because of bodily injury to Mathew are derivative under *Bain v. Gleason*

(1986) and do not trigger separate limits of liability. Under § 61-6-103, MCA (1981) and the Allstate policy's Limitation of Liability clause, such claims do not trigger additional limits, and the only insurance available was the single \$50,000 limit which was already paid out.

E. Covered "bodily injury" where there are physical manifestations of emotional distress

Nevertheless, this still left the issue whether the policy language covers claims of Tiffany and Brandon for mental injuries accompanied by physical manifestations. The court held that, to the extent they are based on physical manifestations, Tiffany and Brandon's claims, fall within the "bodily injury" definition of the Allstate policy. The court overruled *Jacobsen* (2004) in its holding to the contrary. The court reasoned that, in *Jacobsen*, it had held that "the term 'bodily injury' as defined in Farmers Union UM policy, is limited to physical injury to a person caused by an accident and does not include emotional and psychological injuries stemming therefrom." However, the court in this instance said it had erroneously relied on cases alleging only emotional distress and had overlooked a substantial body of cases holding that emotional distress accompanied by physical manifestations constituted bodily injury. The Allstate policy was found to be ambiguous in its definition of bodily injury insofar as the term could include strictly physical injury or could include physical manifestations arising from mental or psychological injury. Accordingly, the court reversed the summary judgment and remanded the case.

Recovery where the emotional distress has physical manifestations was confirmed in *Tucker v. Farmers Ins. Exchange* (2009).⁴⁵ There, eleven-year-old Cady Tucker of Idaho was killed on Montana Highway 83 at Seeley

Lake while riding in a vehicle owned and operated by Cushman, a Montanan. Montana resident, Janie McNair negligently crossed the centerline causing the collision. Cady Tucker died after living an appreciable length of time.

State Farm paid Bodily Injury limits on behalf of McNair as survivorship damages. However, the case went to trial on issues involving the \$1 million UIM umbrella coverage Cady Tucker's stepfather, Robert Starr, had with Farmers Insurance Exchange (FIE). Ultimately, the case was tried against FIE in Montana's Fourth Judicial District where a jury awarded \$516,000.

One of the issues on appeal was whether the mother's emotional distress and grief in the wrongful death action constituted "bodily injury" so as to be covered under the UIM policy coverage. The Montana Supreme Court held that Cady's mother suffered from mental injuries that were accompanied by physical manifestations, which constituted covered "bodily injury." The court noted that FIE relied upon *Jacobson v. Farmers Union* (2004)⁴⁶ which limited "bodily injury" to physical injury to a person caused by an accident. But, *Wagner-Ellsworth* (2008) subsequently construed "bodily injury" to include mental or psychological injury that is accompanied by physical manifestations. The court then discussed in detail such things as PTSD, sweating, increased heart rate, increased respiration, psychosis of seeing and hearing her daughter as physical manifestations of emotional distress. This decision illustrates the technique and evidence necessary to prove physical manifestation of emotional distress.

F. Barring recovery while the *Jacobsen* (2004) window was closed

The federal case of *King v. State Farm Fire and Casualty Co.* (2010)⁴⁷ involved a \$600,088.47 verdict Kings

won against the manufacturer of a log home package. After construction, Kings discovered numerous deficiencies in the log package, which deficiencies breached the contract specifications and included "short and random length logs, an unacceptable mix of fir, spruce and lodge pole pine logs, a lack of 'tie logs' to stabilize the home, logs with a rougher finish than desired which required additional planing and sanding, undesirable gaps at the corners that required sealing, and logs that were not pre-cut." Kings sued the log home manufacturer on multiple counts including a claim for emotional distress. State Farm refused to defend any of the claims.

Kings sued State Farm to enforce the judgment, and State Farm won summary judgment on all counts. The Montana Supreme Court upheld the summary judgments. The issue before the court pertinent to this discussion was whether the underlying complaint alleging emotional distress as a result of the defendant log home manufacturer's perfidy constituted "Bodily Injury" that would be covered under the CGL policy. The court held it would not reasoning that, at the time the complaint was filed, emotional injuries or physical manifestations of emotional injuries were not considered "bodily injury" under *Jacobsen v. Farmers Mutual Ins. Co.* (2004). *Allstate Insurance Co. v. Wagner-Ellsworth* (2008), which allowed physical manifestations of emotional distress as "bodily injury" under liability policies, was not the law of the case, having not been decided at that point.

In the underlying case, Kings also alleged property damage in an attempt to trigger the "Property Damage Liability" coverage. However, the court held the underlying complaint did not allege "property damage" within the meaning of the policy, because any loss of use of the logs or the home wasn't caused by

their destruction but by receipt of poor quality materials. The court found there was no allegation that the logs were injured or destroyed.

G. Can the heir's wrongful death action trigger the "each accident" limit?

Given that, in the case of death, the decedent's estate is the claimant for the survival action, and the heirs are the claimants for different damages on the wrongful death action, the question raised is whether the two actions should trigger the "each accident" limit of casualty insurance coverage?

The Montana Supreme Court has not addressed this issue. However, Judge Cebull for the Montana Federal Court has in *State Farm Mutual Auto. Ins. v. Bowen*,⁴⁸ in 2005. The issue there was whether the "Each Person" limit applies when there are survival and wrongful death claims arising out of the injury and death of a single insured. Judge Cebull held that the wrongful death and survival claims are subject to the "Each Person" limit under the UIM coverage reasoning that the wrongful death and survival action is more like the consortium claim in *Bain* (Mont. 1986) than the emotional distress claim in *Treichel* (Mont. 1997). He reasoned that the tortfeasor in the consortium claim doesn't owe an independent or direct duty to the family member of the victim, while the emotional distress claim is based on a direct duty (foreseeability of injury) to the family bystander. Judge Cebull also submitted that virtually every court that has considered the issue has determined that the wrongful death and survival claims are subject to the "Each Person" limit. We should note that, though the issue in *Bowen* was UIM limits, the same argument will apply to BI limits. This

is an issue of first impression in Montana, and the Montana Supreme Court is not bound by the federal court's determination.

H. Triggering the "each accident" limit for wrongful death with the right policy language

The precise wording of the "Limit of Liability" clause in the auto policy can make the difference in whether one can trigger the "per accident" limit. In the recent case of *State Farm Mut. Auto. Ins. Co. v. Freyer* (2010),⁴⁹ the court triggered a second limit of coverage for a wrongful death claim brought by the infant daughter of the decedent for whose death the carrier had already paid a single limit on the survival action.

In *Freyer*, State Farm insured an auto driven by Vail Freyer in which her husband, Heath Freyer, and infant daughter, Alicia, were passengers. An auto driven by Manning collided with the Freyer vehicle on 19th Avenue outside Bozeman, resulting in Heath's death and injury to the infant Alicia, who incurred \$2,500 in medical expenses. Manning's insurer paid the Bodily Injury coverage limits for Heath's death presumably to Heath's estate on the survival action. State Farm also paid a single "Each Person" limit of \$50,000 for Heath's death under its BI coverage and paid Alicia's medical expense. State Farm refused the demand that it pay a second limit, the "Each Accident" limit of coverage to the infant Alicia for her claim for wrongful death.

The district court granted summary judgment to State Farm finding that the "policy definition of 'bodily injury to one person'" was not ambiguous. Any claim asserted by Alicia related to the wrongful death or survivorship of her father and was therefore included in the "Each Person" limit. However, the "Limits of

Liability" clause for the Bodily Injury coverage provided as follows:

The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability-Coverage A-Bodily Injury, Each Person Each Accident." Under "Each Person" is the amount of coverage for all damages due to bodily injury to one person. "Bodily injury to one person" includes all injury and damages to other persons, including emotional distress, sustained by such other persons who do not sustain bodily injury. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to bodily injury to two or more persons in the same accident. [Emphasis in original removed.]⁵⁰

The policy defined "bodily injury" as "physical bodily injury to a person and sickness, disease or death which results from it. A person does not sustain bodily injury if they suffer emotional distress in the absence of physical bodily injury." The declarations page shows the "each Person" limit of \$50,000 and the Each Accident limit as \$100,000.

The Supreme Court saw the issue in *Freyer* as arising from, "our jurisprudence concerning 'derivative damages' and the specific language of the State Farm policy." Said the court:

"Derivative damages are damages that 'derive' from another person's injury or wrongful death. They are typically sought by the spouse or children of the injured or deceased person, and include, among other things, loss of

consortium, loss of support, grief, sorrow, and mental anguish *Mikelson v. Montana Rail Link, Inc.* 2000 MT 111, 299 Mont. 348, 999 P.2d 985. *Farmers Union Mut. Ins. Co. V. Staples*, 2004 MT 108, 321 Mont. 99, 90 P.3d 381.” Freyer at ¶8.

Under *Allstate v. Wagner-Ellsworth* (2008),⁵¹ the court had established that, “under the policy provision there at issue, the claims of family members for derivative losses sustained as a result of another family member’s bodily injury must be recovered under the ‘each person’ limit of the insured who sustained bodily injury. But, the State Farm policy here provided that, “Bodily injury to one person includes all injury and damages to other persons, including emotional distress sustained by other persons *who do not sustain bodily injury*.” (Emphasis added.) The personal representative representing Alicia argued that the third sentence of the limit of liability clause that confined derivative claims to the “Each Person” limit did not apply to Alicia because she was not among the persons “who do not sustain bodily injury.” The court agreed saying that to construe the clause to apply to all persons with derivative claims would require it to ignore the “who do not sustain bodily injury” language.

On the other hand, the court said, if State Farm’s interpretation was reasonable, then the Limit of Liability provision was ambiguous and had to be construed in Alicia’s favor. The court warned in closing that their decision was driven by the particular language of the State Farm policy before them and that, “It is not our intention here to alter our ‘derivative claims’ jurisprudence as most recently set forth in *Wagner-Ellsworth*.”

Conclusion

Montana tort law has grown to provide significant remedies for family members who suffer secondary injuries or damages by reason of direct severe injury of death of a loved one. However, insurance and the law governing insurance dictate how much the rights of tort victims and their family members who suffer damages will be vindicated. Language of the basic insuring agreements, such as policy definitions of “bodily injury,” and “Limits of Liability” clauses are critical to court decisions on coverage of family member injuries and damages. It is imperative that counsel study these clauses intricately and know the permutations of the tort cases governing loss of consortium and emotional distress in tandem with the insurance cases.

Dealing with the claims of the family members of persons severely injured or killed requires a trial lawyer’s best analytical skills and creativity.

ENDNOTES

1. Thank you to Dan Buckley and Pat Sheehy for editing, Gary Zadick for reviewing, and 2L Jack Holland for cite checking.

2. 206 Mont. 313, 671 P.2d 583.

3. 2008 MT 240, 344 Mont. 445, 188 P.3d 1042.

4. 2003 MT 309, 318 Mont. 232, 79 P.3d 1095.

5. Trial Trends, Summer 2004, pgs. 26-37.

6. 206 Mont. 325, 671 P.2d 589.

7. 38 Mont. 521, 100 P. 971.

8. 38 Mont. 143, 99 P. 142.

9. 329 Mont. 347, 125 P.3d 597.

10. 160 Mont. 453, 503 P.2d 667.

11. 282 Mont. 1, 934 P.2d 1018.

12. 164 Mont. 41, 518 P.2d 795.

13. *Swanson v. Champion Intern. Corp.*, 197 Mont. 509, 646 P.2d 1146 (1982).

14. 206 Mont. 313, 671 P.2d 583.

15. 69 Cal.Rptr. 72, 441 P.2d 912.

16. *Maquire v. State of Montana*, 254 Mont. 178, 835 P.2d 755.

17. 211 Mont. 465, 686 P.2d 209.

18. 236 Mont. 455, 771 P.2d 114.

19. 236 Mont. 195, 771 P.2d 84.

20. 200 F.Supp. 71.

21. 214 F.Supp. 298.

22. 266 F.Supp. 671.

23. 223 Mont. 442, 726 P.2d 1153.

24. 248 Mont. 521, 813 P.2d 429.

25. Citing, *Dawson v. Hill*, supra.

26. 258 Mont. 158, 852 P.2d 574.

27. 192 F.Supp.2d 1053.

28. Supra, note 23.

29. Pun courtesy of Editor Sheehy.

30. 271 Mont. 209, 869 P.2d 411.

31. Supra, note 16.

32. 280 Mont. 443, 930 P.2d 661.

33. Supra, note 4.

34. 2004 MT 20, 319 Mont. 307, 84 P.3d 38.

35. 2009 MT 248, 351 Mont. 464, 215 P.3d 649.

36. 207 MT 62, 336 Mont. 225, 154 P.3d 561.

37. 2008 MT 252, 345 Mont. 12, 192 P.3d 186.

38. *Jacobsen*, supra, note 35, Fn. 3 citing, *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725 (1984) and *Loran v. Fortis Ins. Co.*, 2008 MT 252, 345 Mont. 12, 192 P.3d 186.

39. Personal Auto PP 00 01 01 05 pg. 1 of 13.

40. Definitions, Personal Auto PP 00 01 01 05 pg. 1 of 13.

41. Id. at 4.

42. Supra, note 32.

43. 2004 MT 72, 320 Mont. 375, 87 P.3d 995.

44. 2008 MT 240, 344 Mont. 445, 188 P.3d 1042.

45. 2009 MT 247, 351 Mont. 448, 215 P.3d 1.

46. Supra, note 43.

47. LEXSEE 2010 U.S. DIST. LEXIS 49029.

48. 34 MFR 1.

49. 2010 MT 191, 357 Mont 329, 239 P.3d 143.

50. Id., at ¶ 7.

51. Supra, note 44. ♦